



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

DEMIRJIAN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON RECEIVABILITY**

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**Counsel for the Applicant:**

Daniel Trup, OSLA

**Counsel for the Respondent:**

Fabrizio Mastrogirolamo, UNDP

## **Introduction**

1. The Applicant is the Director, Political Affairs and Mediation in the Department of Peacekeeping Operations and is based in Mogadishu, Somalia. In her Application filed on 6 May 2014, she contests the decision to place a reprimand in her personnel file. The events giving rise to the reprimand occurred when the Applicant served as a Democratic Governance Practice Leader, Regional Bureau for Europe and the Commonwealth of Independent States (RBEC), United Nations Development Programme (UNDP).

2. The Respondent filed a Reply on 5 June 2014 in which it is asserted that the Application is without merit and is not receivable.

3. The Applicant, anticipating the Respondent's objection to her Application on the grounds of receivability, had made submissions on the same in her Application.

## **Facts**

4. Between March 2009 and December 2013, the Applicant served as Democratic Governance Practice Leader, RBEC, UNDP.

5. On 7 September 2013, Ms. Helen Clark, Administrator of UNDP, "tweeted" that "Governance is an important driver of success of the next global development agenda".

6. In response the Applicant tweeted to Ms. Clark that "UNDP is shutting down governance in RBEC which will impact our work hugely in Central Asia".

7. On 11 September 2013, the Applicant received an e-mail from Mr. Patrick Keuleers, Officer in Charge of the Democratic Governance Group and Mr. Olivier Adam, Director, Regional Centre, RBEC. The e-mail subject was titled "Note to file – Your message on a public internet platform in response to a twitter message from UNDP Administrator Helen Clerk".

8. In the e-mail, the Applicant was informed that both Mr. Keuleers and Mr. Adam were aware of the twitter message that she had posted on 7 September 2013. It cited that:

Response on a public internet platform is very unfortunate; it lacks professional judgment and seriously questions your ability to continue representing the organisation at a professional level. As stipulated in the UN Staff Rules and Regulations, as international civil servants, we do not criticise senior managers' decisions publicly and certainly do not launch unfounded statements that the organisation would withdraw its governance support to one region...

It concluded that:

Given the seriousness of this incident, we have jointly decided, in consultation with senior management in the organisation to... Communicate to you this note that will be recorded in your personnel file, indicating the corporate disapproval of the statements you have made publicly, while acting in a UNDP Policy Advisor/Team Leader position... Your reaction to it will be included in this NTF [Note to File].

9. On 13 September 2013, the Applicant wrote to Mr. Keuleers expressing her objection to the fact that a reprimand had been issued without her having been given the opportunity to explain her case.

10. On 7 January 2014, the Applicant wrote to Ms. Miroslava Satinova, Human Resources Advisor in the Bureau for Development Policy at UNDP. She requested that UNDP consider removing the written reprimand from her file.

11. On 25 February 2014, Ms. Satinova contacted the Applicant by e-mail and stated that:

I have reviewed the note to the file you received. The letter you received is not a disciplinary measure, it's rather letter (sic) documenting the critical incident related to your performance.

12. On 26 February 2014, the Applicant submitted a request for management evaluation against the decision to place a written reprimand in her personnel file.

13. On 11 April 2014, the Assistant Administrator and Director, Bureau of Management, to whom the UNDP Administrator has delegated the authority to

respond to requests for management evaluation responded to the Applicant's request and informed her that her request was time-barred and not receivable.

**Respondent's submissions on receivability**

14. The Respondent submits that the Application is time-barred and therefore not receivable.

15. In the present case, the Applicant failed to file a request for management evaluation within the 60-day deadline set forth by staff rule 11.2(c). Since the Applicant received the Note to File on 11 September 2013, the 60-day deadline for the Applicant to file her request for management evaluation started to run on 12 September 2013 and she should have filed it by 11 November 2013. However, the Applicant only filed her request for management evaluation on 26 February 2014.

16. The Applicant contends that the Note to File of 11 September 2013 was an initial email notification that a written reprimand would be placed in her personnel file and that a decision in that regard would be taken only after she sent an official reply. On the contrary, the Note to File clearly stated that it would be recorded in her personal file. The Note to File contained all the facts required for the Applicant to file a request for management evaluation and it was her duty to pursue her cause of action promptly.

17. The email of 25 February 2014 from the HR Advisor did not constitute a new administrative decision and is not subject to appeal. The sole administrative decision that the Applicant could have impugned is constituted by the Note to File of 11 September 2013. Given the direct impact that such a decision had on the Applicant's interest and standing, it was incumbent upon her to file a request for management evaluation within the 60-day statutory deadline.

18. The HR Advisor had no authority over the Applicant's supervisors allowing her to overturn the issuance of the Note to File and to remove it from the Applicant's personnel file. Therefore, the HR Advisor's email of 25 February

2014 cannot be considered as a new administrative decision as she had no authority to make such a decision.

**Applicant's submissions on receivability**

19. In the Management Evaluation Review, the Administration argues that the decision to place the written reprimand on her file was taken on 11 September 2013. As a result, she had 60 days as of that date to challenge the impugned decision. This argument is fundamentally flawed.

20. The initial e-mail notification of 11 September 2013 that a written reprimand would be placed on her personnel file included at the bottom of the message a note stating that “your reaction to it [written reprimand] will be included in this NTF”. The Applicant was under the mistaken belief that this meant that she would have an opportunity to reply. Only after her official reply was received, would consideration of her comments and the alleged misconduct be taken into account by the Administration, after which a decision would be taken as to whether a written reprimand was warranted.

21. Effectively, the Applicant was relying on established principles of jurisprudence, which, as stated below, includes the fundamental concept of the right to be heard as codified in ST/AI/292 (Filing of Adverse Materials in Personnel Records). Therefore, the Administration cannot simply rely on 11 September 2013 date as the requisite starting point for any time limit. Consideration must also be given to the date at which the Applicant became aware that such due process rights were not being afforded to her and that the written reprimand was being placed in her file without any formal right of reply.

22. At that point, on 7 January 2014, the Applicant contacted the UNDP Administration to seek removal of the written reprimand realising that no real and genuine right of reply was going to be afforded to her. Further, on 26 February 2014, the Applicant filed a Management Evaluation request, within the sixty-day time limit established.

23. In *Zewdu* UNDT/2011/043, the Tribunal considered that any time limit imposed under the Staff Rules would run from the earliest time that legal action could have been brought. Every fact required to commence an action must be in existence before time begins to run. In this case, therefore, only when the Applicant became aware that due process rights were not to be afforded to her, after repeatedly requesting clarification from the Administration, did any time limits commence.

24. The Applicant seeks to challenge the Administration's implicit refusal to remove the written reprimand. As indicated, no administrative decision with respect to this request was made until 25 February 2014, when an implicit refusal was given by Ms. Satinova. It is this final definitive administrative decision which forms the subject matter of the complaint.

### **Considerations**

25. Article 8.1(c) of the Dispute Tribunal's Statute provides that an application shall be receivable if an applicant has previously submitted the requested administrative decision for management evaluation where required. Article 8.3 stipulates, inter alia, that the Tribunal shall not suspend or waive the deadlines for management evaluation.

26. In order to adjudicate on the receivability of this Application, the Tribunal must answer the following question, when was the final decision taken on the placement of the reprimand in the Applicant's personnel file?

27. The Applicant received notification concerning the Note to File which constituted a reprimand on 11 September 2013. She then engaged in a series of discussions with the Administration expressing her objection to it. It was only on 25 February 2014 that the Applicant's queries were fully answered by the UNDP Administration in the form of the email from Ms. Satinova. The Tribunal is of the view that the final decision taken on the placement of the reprimand in the Applicant's personnel file was on this date, 25 February 2014 when her attempts to have her comments taken into consideration were finally exhausted.

28. The course of action embarked on by the Applicant to have the matter resolved informally before resorting to the formal process was justifiable in the circumstances given the requirements of ST/AI/292. Paragraph 2 of ST/AI/292 stipulates that:

Adverse material shall mean any correspondence, memorandum, report, note or other paper that reflects adversely on the character, reputation, conduct or performance of a staff member. *As a matter of principle, such material may not be included in the personnel file unless it has been shown to the staff member concerned and the staff member is thereby given an opportunity to make comments thereon.* It shall be handled and filed in accordance with the procedures set out below, depending upon its source. (Emphasis added).

29. The Tribunal finds that time began to run from 26 February 2014 for the Applicant to request for a management evaluation. She filed the management evaluation request on 26 February 2014, well within the deadline.

## **JUDGMENT**

30. In view of the foregoing, the Tribunal decides that this Application is receivable.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 11<sup>th</sup> day of February 2015

Entered in the Register on this 11<sup>th</sup> day of February 2015

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi